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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE BETH LABSON FREEMAN

ARISTA NETWORKS, INC.,	)	
	)	
PLAINTIFF,	)	
	)	
VS.	)	NO. 16-CV-00923-BLF
	)	
CISCO SYSTEMS, INC.	)	
	)	SAN JOSE, CALIFORNIA
DEFENDANT.	)	THURSDAY
	)	MARCH 2, 2017
_____	)	

**TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND**

**RECORDING 11:33 A.M. - 11:52 A.M.**

**APPEARANCES:**

**FOR PLAINTIFF**

KEKER & VAN NEST LLP  
633 BATTERY STREET  
SAN FRANCISCO, CALIFORNIA 94111

**BY: ROBERT VAN NEST, ESQUIRE  
BRIAN FERRALL, ESQUIRE**

**FOR DEFENDANT**

DESMARAIS LLP  
230 PARK AVENUE  
NEW YORK, NEW YORK 10169

**BY: JOHN M. DESMARAIS, ESQUIRE  
BRIAN LEARY, ESQUIRE**

**TRANSCRIBED BY: JOAN MARIE COLUMBINI, CSR #5435, RPR  
RETIRED OFFICIAL COURT REPORTER, USDC**

1 THURSDAY, MARCH 2, 2017 11:33 A.M.

2 (TRANSCRIBER'S NOTE: DUE AT TIMES TO COUNSELS' FAILURE TO  
3 IDENTIFY THEMSELVES WHEN SPEAKING, CERTAIN SPEAKER  
4 ATTRIBUTIONS ARE BASED ON EDUCATED GUESS.)

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6 PROCEEDINGS

7 **THE CLERK:** CALLING CASE 16-0923, ARISTA NETWORKS  
8 VERSUS CISCO SYSTEMS.

9 COUNSEL, PLEASE COME FORWARD AND STATE YOUR  
10 APPEARANCES.

11 **MR. VAN NEST:** GOOD MORNING, YOUR HONOR. BOB  
12 VAN NEST AND BRIAN FERRALL HERE FOR ARISTA NETWORKS.

13 **THE COURT:** GOOD MORNING.

14 **MR. VAN NEST:** NICE TO BE BACK.

15 **MR. DESMARAIS:** GOOD MORNING, YOUR HONOR. JOHN  
16 HARRIS AND BRIAN LEARY FOR CISCO.

17 **THE COURT:** WELL, MR. VAN NEST, THE PRIOR CASE WANTED  
18 MORE DEPOSITIONS THAN EVEN YOU WOULD ASK FOR, HUH?

19 **MR. VAN NEST:** WELL, I'M NOT SURE ABOUT THAT. I HAVE  
20 A GREATER SENSE OF REALISM, HAVING BEEN IN YOUR COURT A NUMBER  
21 OF TIMES, YOUR HONOR, SO...

22 **THE COURT:** IT'S GOOD TO SEE ALL OF YOU AGAIN.  
23 YOU'VE CHANGED SIDES NOW --

24 **MR. VAN NEST:** WE HAVE.

25 **THE COURT:** -- SO WE'LL HAVE TO KEEP THAT IN MIND.

1           IN LOOKING AT YOUR PAPERS, IT OCCURRED TO ME THIS  
2 CASE MIGHT ACTUALLY EVEN BE BIGGER THAN THE LAST ONE, WHICH I  
3 DIDN'T SMILE WHEN I HAD THAT THOUGHT, BUT THIS SEEMS PRETTY  
4 COMPLICATED, AND I THINK WE'RE GOING TO NEED TO HAVE A PRETTY  
5 GOOD PLAN, BECAUSE, FRANKLY, IT IS LIKELY THAT I'M GOING TO  
6 LIFT THAT STAY, AND YOU DON'T HAVE A LOT OF TIME TO MOVE THIS  
7 CASE ALONG WITH TRIAL IN AUGUST OF 2018.

8           SO LET'S TALK ABOUT THE STAY RIGHT AWAY AS TO WHETHER  
9 THAT SHOULD BE LIFTED. MR. VAN NEST, OF COURSE YOU WANT IT TO  
10 BE LIFTED. YOU NEVER WANTED IT IN THE FIRST PLACE.

11           **MR. VAN NEST:** THAT'S RIGHT. AND I'LL REMIND THE  
12 COURT THAT WHEN YOUR HONOR ISSUED THE STAY BACK IN AUGUST -- SO  
13 WE'VE BEEN STAYED FOR SIX MONTHS NOW -- YOU INDICATED THAT THE  
14 RESOLUTION OF THE COPYRIGHT CASE WAS NOT GOING TO SEND THE  
15 ANTITRUST CASE AWAY, AND THAT'S CERTAINLY TRUE. AND YOU  
16 INDICATED THAT THE STAY WOULDN'T BE EXTENDED PAST JUDGMENT,  
17 WHICH WAS ENTERED IN DECEMBER, AND THAT, IN FACT, IT WOULD NOT  
18 INCLUDE POST-TRIAL MOTIONS, SO ON AND SO FORTH.

19           WE DID AGREE TO A SHORT STAY FOR CONVENIENCE OF  
20 COUNSEL AND THE PARTIES --

21           **THE COURT:** YEAH, YEAH.

22           **MR. VAN NEST:** -- IN LIGHT OF THE POST-TRIAL UNTIL  
23 NEXT WEEK. BUT, AS YOUR HONOR OBSERVED, WE HAVE AN AUGUST 2018  
24 DATE. BOTH PARTIES ARE PROPOSING A DISCOVERY CUTOFF THIS FALL.  
25 I THINK WE CAN WORK OUT THE SCHEDULING DETAILS, BUT WE SURE

1 CANNOT AFFORD --

2 **THE COURT:** YEAH.

3 **MR. VAN NEST:** -- ANOTHER 60, 90, OR ANY AMOUNT OF  
4 STAY TIME. WE HAVE DISCOVERY PENDING. WE NEED TO GET THAT.  
5 THERE ARE MANY DEPOSITIONS WE'LL NEED TAKE, AS YOUR HONOR  
6 KNOWS, AND -- SO I THINK THAT'S THE MAIN EVENT FOR TODAY, IS --

7 **THE COURT:** YEAH.

8 **MR. VAN NEST:** -- LET THIS CASE GO FORWARD. IT'S  
9 TIME.

10 REMEMBER, WE MOVED HEAVEN AND EARTH TO GET CISCO  
11 THEIR EARLY TRIAL DATE, AND ALL I'M ASKING IS WE GET ON TRACK  
12 SO THAT OUR AUGUST 2018 DATE --

13 **THE COURT:** YEAH. I DID NOT SET THE ANTITRUST CASE  
14 FOR ANY EARLIER THAN MY NEXT AVAILABLE DATE.

15 **MR. VAN NEST:** RIGHT.

16 **THE COURT:** IT'S JUST THIS HAS BEEN PENDING A WHILE.

17 MR. DESMARAIS, WHEN CISCO ARGUED FOR THE STAY IN  
18 AUGUST, IT WAS CLEAR -- I HAVE A CLEAR RECOLLECTION OF THE  
19 DISCUSSION. AND, IN FACT, MR. PAK, I THINK, REALLY MADE THE  
20 ARGUMENT THAT IT WAS JUST UNTIL THE JURY VERDICT. THAT'S WHAT  
21 THEY WERE ASKING FOR. IT DIDN'T PRECLUDE A REQUEST FOR A  
22 FURTHER STAY. I DON'T WANT TO SUGGEST THAT. BUT LET ME HEAR  
23 YOUR COMMENTS ON THE STAY.

24 **MR. DESMARAIS:** YES, YOUR HONOR. I MEAN, LOGICALLY,  
25 THERE ARE REALLY STRONG REASONS THAT THIS CASE SHOULD BE

1 STAYED, SO LET ME JUST GO THROUGH A FEW POINTS THAT I THINK --

2 **THE COURT:** OKAY.

3 **MR. DESMARAIS:** -- WILL HELP MAKE IT CLEAR.

4 **THE COURT:** OKAY.

5 **MR. DESMARAIS:** FIRST OF ALL, AS YOUR HONOR AND  
6 MR. VAN NEST POINTED OUT, IT HAS BEEN STAYED, AND WE'VE LEARNED  
7 A LOT DURING THE STAY WHICH INDICATES IT SHOULD BE CONTINUED.  
8 FOR INSTANCE, WE'VE NOW HAD THE CLI COPYRIGHT. WHAT DID WE  
9 LEARN AT THE CLI COPYRIGHT TRIAL? FIRST OF ALL, WE KNOW ARISTA  
10 INFRINGED CISCO'S COPYRIGHTS, BUT, MORE IMPORTANTLY, FOR THE  
11 PURPOSE OF THIS ARGUMENT, WE ALSO KNOW THAT ARISTA FAILED TO  
12 PROVE ITS MISUSE AND ABANDONMENT DEFENSES. AT LEAST THE JURY  
13 RECOMMENDED THERE WAS A FAILURE OF PROOF.

14 IF ARISTA CANNOT MAKE OUT A MISUSE AND AN ABANDONMENT  
15 ON THE SAME -- IF YOU READ THEIR COMPLAINT, THEIR COMPLAINT IS  
16 THE SAME AS THEIR MISUSE AND ABANDONMENT DEFENSES, SO WHAT WE  
17 WILL BE BRIEFING IN THE MOTION TO DISMISS THAT WE'RE PLANNING  
18 TO FILE --

19 **THE COURT:** YEAH.

20 **MR. DESMARAIS:** -- IN A COUPLE OF WEEKS IS THAT IF  
21 THEY CAN'T MAKE A MISUSE AND ABANDONMENT, THEY CAN'T MAKE THE  
22 ANTITRUST CLAIM. SO THE CLAIM OUGHT TO BE DISMISSED.

23 MORE IMPORTANTLY, CISCO'S MADE A TARGETED POST-TRIAL  
24 MOTION, WHICH IS PENDING, IT'S BEEN BRIEFED (INDISCERNIBLE).  
25 LEGALLY CISCO BELIEVES THEY WERE RIGHT ON THAT. IF -- YOU

1 KNOW, IF YOUR HONOR AGREES, WELL, THEN WE KNOW ARISTA IS LIABLE  
2 FOR INFRINGEMENT, AND THE ANTITRUST GOES AWAY.

3 EQUALLY IMPORTANT NOW -- AND YOUR HONOR MAY NOT HAVE  
4 THIS AT THE TOP OF MIND BECAUSE IT'S NOT IN THIS COURT, BUT  
5 WHAT ELSE HAS HAPPENED IS THE ITC HAS BARRED ARISTA FROM  
6 IMPORTING THESE PRODUCTS ANY LONGER. THEY'VE BEEN ORDERED TO  
7 CEASE AND DESIST ORDERS TO STOP SELLING IN THE UNITED STATES.  
8 EVERY SINGLE PRODUCT ARISTA MAKES IS INFRINGING CISCO'S PATENTS  
9 BY THE ITC RULING AND CUSTOMS -- THEY TRIED TO REDESIGN.  
10 CUSTOMS HAS BASICALLY SAID THE REDESIGN DOESN'T GET THE JOB  
11 DONE.

12 THE LAW IS PRETTY CLEAR -- AND WE'LL BRIEF THIS IN  
13 THE MOTION TO DISMISS -- THAT IF YOU'RE ON THE MARK ILLEGALLY  
14 WITH INFRINGING PRODUCTS YOU CANNOT --

15 **THE COURT:** SURE.

16 **MR. DESMARAIS:** -- HAVE A VALID ANTITRUST CLAIM.

17 **THE COURT:** SURE.

18 **MR. DESMARAIS:** THE LAW IS VERY CLEAR ON THAT.

19 SO IF WE BRIEF THAT -- AND YOUR HONOR CAN DECIDE  
20 THIS -- YOU KNOW, I KNOW YOU HAVE A BUSY SCHEDULE, BUT IN SHORT  
21 WE'RE REALLY -- BECAUSE IT'S NOT A COMPLICATED ISSUE, THEY HAVE  
22 NO ANTITRUST CLAIM.

23 (SIMULTANEOUS COLLOQUY.)

24 **THE COURT:** SO WHY WOULDN'T WE WANT TO GET THAT DONE?  
25 WHY WOULDN'T WE WANT TO GET THAT MOTION HEARD AND DISPOSED OF?

1           **MR. DESMARAIS:** I DO.

2           **THE COURT:** NOT IF I STAY --

3           (SIMULTANEOUS COLLOQUY.)

4           **MR. DESMARAIS:** STAYED UNTIL YOU DECIDE THAT. WE'RE  
5 GOING TO FILE IN TWO WEEKS.

6           **THE COURT:** YEAH.

7           **MR. DESMARAIS:** THE DUE DATE IS MARCH 23RD, AND IF  
8 YOU DECIDE THAT -- THAT WE HAVE WASTED EVERYONE'S RESOURCES  
9 (INDISCERNIBLE). BUT THERE'S A THIRD REASON, TOO, WHICH I  
10 THINK IS A --

11           (SIMULTANEOUS COLLOQUY.)

12           **THE COURT:** SO I HAVE A COMPLETE STAY IN THE CASE, I  
13 THOUGHT, UNTIL NOW, NOT JUST A DISCOVERY STAY?

14           **MR. VAN NEST:** THAT'S RIGHT, YOUR HONOR.

15           **THE COURT:** OKAY. SO YOU'RE ASKING TO LIFT THE STAY  
16 SO YOU CAN FILE YOUR MOTION?

17           **MR. DESMARAIS:** WHAT I'M ASKING FOR IS THAT WE DON'T  
18 START DISCOVERY --

19           **THE COURT:** OKAY.

20           **MR. DESMARAIS:** -- UNTIL YOU DECIDE THE MOTION TO  
21 DISMISS --

22           **THE COURT:** OKAY.

23           **MR. DESMARAIS:** -- THAT WE'RE GOING TO FILE --

24           **THE COURT:** OKAY.

25           **MR. DESMARAIS:** -- ON MARCH 23RD.

1           **THE COURT:**   OKAY.

2           **MR. DESMARAIS:**   SO I CAN TELL YOU EXACTLY WITH A FINE  
3 POINT WHAT I'M ASKING FOR, BUT LET ME JUST MAKE THIS ONE LAST  
4 POINT --

5           **THE COURT:**   SURE.

6           **MR. DESMARAIS:**   -- ON THE MOTION TO DISMISS.

7                   ANOTHER VERY COMPELLING LEGAL DEVELOPMENT SINCE LAST  
8 WE'VE SPOKEN, AFTER ARISTA'S -- ONE OF THE OTHER PRONGS OF  
9 THEIR ANTITRUST COMPLAINT, WHICH IS A BIG PART OF THEIR  
10 COMPLAINT, IS THIS BUNDLING ALLEGATION. I DON'T KNOW IF YOUR  
11 HONOR'S FAMILIAR WITH IT.

12           **THE COURT:**   YEAH.

13           **MR. DESMARAIS:**   THEY'RE SAYING WE'RE BUNDLING  
14 PRODUCTS AND SERVICES. AND THEY RELY ON THE *PEACEHEALTH*  
15 DECISION FROM THE NINTH CIRCUIT THAT ADDRESSES THAT  
16 (INDISCERNIBLE).

17                   SINCE THEIR COMPLAINT LAST FALL -- SO AFTER THE  
18 COMPLAINT, THE NINTH CIRCUIT DECIDED A NEW CASE, *AEROTEC*, WHICH  
19 LIMITED THE HOLDING OF *PEACEHEALTH* AND ESSENTIALLY DESTROYS THE  
20 LEGAL VALIDITY OF ARISTA'S BUNDLING ALLEGATIONS. THEY'RE  
21 LEGALLY INFIRMED NOW.

22                   SO, ESSENTIALLY, FOR THREE PRONGS WE THINK THEY CAN'T  
23 GO FORWARD.

24                   NUMBER ONE, THEY FAILED ON MISUSE AND ABANDONMENT,  
25 AND IF THEY CAN'T MEET THOSE, THEY CAN CERTAINLY NOT TAKE THOSE



1 SAME FACTS AND MAKE THEM ANTITRUST, WHICH IS HARDER TO PROVE.

2 SECONDLY, WITH THE POST-TRIAL MOTION PENDING ON  
3 (INDISCERNIBLE), WE THINK WE'RE LEGALLY RIGHT. YOU COULD  
4 REVISER THE JURY VERDICT AND THEN INFRINGEMENT HASN'T BEEN  
5 FOUND.

6 THIRD, THE ITC'S BARRED ALL THESE PRODUCTS, EVERY  
7 SINGLE PRODUCT. THEY'RE ON THE MARKET ILLEGALLY, AND LEGALLY  
8 THEY CANNOT HAVE A VALID ANTITRUST CLAIM.

9 AND, LASTLY, WITH THE NEW DECISION IN THE AEROTEC  
10 CASE FROM THE NINTH CIRCUIT THEY CAN'T EVEN GO FORWARD ON THEIR  
11 BUNDLING ALLEGATION.

12 SO WHAT WE'RE ASKING FOR IS IF THERE'S SUCH  
13 FUNDAMENTAL PROBLEMS WITH THE COMPLAINT, WHY ON EARTH WOULD WE  
14 START EXPENSIVE ANTITRUST DISCOVERY --

15 **THE COURT:** -- YEAH.

16 **MR. DESMARAIS:** -- UNTIL THAT MOTION IS --  
17 (SIMULTANEOUS COLLOQUY.)

18 **THE COURT:** SO YOU INDICATE YOU'RE INTENDING TO FILE  
19 THAT MOTION IN ABOUT TWO WEEKS, MARCH 21?

20 **MR. DESMARAIS:** YEAH, WE AGREED TO THAT DATE.

21 **THE COURT:** SURE. THAT'S GREAT.

22 **MR. DESMARAIS:** MARCH 23RD, I BELIEVE IS THE DATE.

23 **THE COURT:** OKAY. AND SO YOUR HEARING DATE ISN'T  
24 GOING TO BE UNTIL AUGUST. THAT'S --

25 **MR. DESMARAIS:** I DON'T KNOW THAT I CHECKED THE

1 HEARING DATES --

2 (SIMULTANEOUS COLLOQUY.)

3 **THE COURT:** BUT THAT'S WHEN IT'S GOING TO BE.

4 **MR. DESMARAIS:** RIGHT.

5 **THE COURT:** AND YOUR DECISION ON THAT COULD BE AS  
6 MUCH AS -- AND YOU KNOW CLERKS TURN OVER IN AUGUST. IT'S NOT  
7 MY FASTEST TIME. I'M SORRY. JUST TO BE CANDID WITH YOU, BUT  
8 YOU KNOW THAT AS WELL.

9 SO WE COULD BE LOOKING AT UPWARDS OF 90 DAYS FOR ME  
10 TO GET AN ORDER OUT, AND THEN WE'RE -- THEN WE'RE IN NOVEMBER  
11 BEFORE DISCOVERY HAS STARTED, AND YOUR TRIAL DATE AT THAT POINT  
12 IS LESS THAN A YEAR AWAY, AND THAT'S A PROBLEM. BECAUSE IF YOU  
13 CAN'T KEEP THE CURRENT TRIAL DATE, THIS IS TOO BIG A CASE FOR  
14 ME TO SHOEHORN IN ANYWHERE ELSE.

15 AND YOU JUST HEARD WITH THE LAST ONE, IT WILL BE  
16 THANKSGIVING IN MY COURTROOM AGAIN, MR. VAN NEST. SO DON'T  
17 LOOK FORWARD TO THAT.

18 **MR. VAN NEST:** WONDERFUL. CAN'T WAIT.

19 **MR. DESMARAIS:** CAN I COMMENT ON THAT?

20 **MR. VAN NEST:** I'D LIKE TO RESPOND TO SOME OF THESE  
21 COMMENTS, TOO, YOUR HONOR.

22 **THE COURT:** AND I WANT TO HEAR FROM THAT, YES. I  
23 UNDERSTAND.

24 **MR. DESMARAIS:** LET ME JUST COMMENT ON THE ONE PART  
25 OF -- YOU KNOW, HOW ONEROUS THIS CASE WILL BE. AS YOUR HONOR

1 IS WELL AWARE, THESE PARTIES HAVE BEEN LITIGATING FOR YEARS.

2 **THE COURT:** OH, YEAH. I THINK ANYTHING YOU DO IS  
3 ONEROUS. YOU GAVE ME A 25-PAGE CASE MANAGEMENT STATEMENT. I  
4 MEAN --

5 **MR. DESMARAIS:** WHAT I MEAN BY THAT IS A LOT OF THE  
6 DOCUMENTS HAVE ALREADY BEEN EXCHANGED.

7 **THE COURT:** OKAY.

8 **MR. DESMARAIS:** (INDISCERNIBLE) DOCUMENTS. THEY'VE  
9 DEPOSED SO MANY PEOPLE AT CISCO AND VICE VERSA. YOU KNOW, IS  
10 THERE REALLY ALL THAT MUCH MORE TO GET GOING?

11 SO I THINK IF WE TAKE THE TIME NOW TO DEAL WITH THE  
12 MOTION TO DISMISS, WE CAN THEN --

13 (SIMULTANEOUS COLLOQUY.)

14 **THE COURT:** SO, MR. DESMARAIS, THIS MAY ACTUALLY BE A  
15 PROBLEM OF YOUR OWN MAKING, HAVING ASKED FOR THE STAY IN THE  
16 FIRST PLACE. YOU KNOW, I'M JUST A LITTLE TROUBLED BY THAT. I  
17 I'M JUST A LITTLE CONCERNED YOU WANT YOUR WHOLE -- THE WHOLE  
18 PROCESS HAS BEEN DELAYED BY CISCO, AND THAT'S TROUBLING TO ME.  
19 THE WHOLE PROCESS ON THE CLI CASE WAS LET'S SPEED THIS ALONG.  
20 SO WE SPED ALONG THE ONE WHERE YOU THOUGHT YOU HAD UPSIDE, AND  
21 IT WORKED OUT THE WAY IT WORKED OUT, AND WE'RE MIDSTREAM ON  
22 THAT. AND NOW WHEN YOU CHANGE SIDES OF THE AISLE HERE NOW YOU  
23 WANT TO SLOW IT DOWN.

24 I DON'T DISAGREE WITH YOU THAT GENERALLY HAVING --  
25 TAKING THE TIME TO CAREFULLY EVALUATE A MOTION TO DISMISS THAT

1 RAISES THE KINDS OF ISSUES YOU SUGGEST HERE IS SOMETHING THAT  
2 WE NEED DO, BUT THE CASE IS ALREADY OVER A YEAR OLD.

3 **MR. VAN NEST:** IT IS.

4 **THE COURT:** AND WITH MY TRIAL SCHEDULE SO IMPACTED --  
5 AND I THINK YOU SUGGEST POTENTIALLY A THREE-WEEK TRIAL, AND  
6 THERE'S NO WAY TO SHOEHORN THAT IN ANYWHERE.

7 SO THAT'S WHERE I'M TROUBLED. I DO WANT TO HEAR  
8 MR. VAN NEST'S RESPONSE, BUT THOSE ARE MY REACTIONS TO WHAT  
9 SOUNDS LIKE IT COULD BE -- IT'S A VERY IMPORTANT MOTION TO  
10 DISMISS, AND, YOU KNOW, I'M GOING TO HAVE TO COME UP TO SPEED  
11 IN THIS CASE, BECAUSE ONCE IT WAS STAYED, IT WAS OFF OF MY  
12 DOCKET COMPLETELY. I WASN'T THINKING ABOUT IT, AND NOW IT'S  
13 TIME TO TURN TO IT.

14 **MR. VAN NEST,** LET ME HEAR FROM YOU.

15 **MR. VAN NEST:** YEAH. WE HAVE NO PROBLEM WITH HAVING  
16 THE MOTION HEARD IN DUE COURSE, THE MOTION TO DISMISS.

17 **THE COURT:** YEAH.

18 **MR. VAN NEST:** I DON'T THINK IT WILL BE SUCCESSFUL,  
19 BUT THEY CERTAINLY HAVE A RIGHT TO BRING IT.

20 I FEEL AS THOUGH THEY'VE TAKEN ADVANTAGE OF ME AND  
21 TAKEN ADVANTAGE OF THE COURT WITH THIS WHOLE THING, BECAUSE  
22 ORIGINALLY WHAT THEY ASKED FOR WAS A STAY THROUGH JUDGMENT, AND  
23 WE FOUGHT THAT, BUT YOUR HONOR SAW FIT TO DO IT. THEN THEY  
24 CAME AND SAID, WE NEED A COUPLE OF MORE MONTHS UNTIL THE CMC,  
25 AND I SAID, WELL, FINE, IT'S HOLIDAYS, WE HAVE BRIEFING TO DO,

1 OKAY, FINE.

2 SO THE STATUS IS THE STAY EXPIRED IN DECEMBER, AND  
3 THEN WE AGREED TO EXTEND IT UNTIL NEXT WEEK SO WE COULD COME  
4 HERE AND DO THE STATUS CONFERENCE. AND NOW THEY WANT -- YOU  
5 KNOW, NOW THEY WANT EVEN MORE TIME.

6 SO JUST TO SET RECORD STRAIGHT, ARISTA IS ON THE  
7 MARKET. ARISTA HAS ESTABLISHED DOMESTIC MANUFACTURING. WE ARE  
8 SELLING PRODUCT HERE IN THE UNITED STATES THAT IS MANUFACTURED  
9 HERE IN THE UNITED STATES.

10 CUSTOMS INITIALLY FOUND THE DESIGN-AROUNDS WERE  
11 SUFFICIENT AND ALLOWED IMPORTATION. THE ONLY THING THAT'S  
12 CHANGED NOW IS THAT CISCO HAS ASKED FOR A FURTHER PROCESS TO  
13 EVALUATE DESIGN-AROUND, AND THAT PROCESS IS ONGOING NOW.

14 BUT ARISTA HAS ESTABLISHED DOMESTIC MANUFACTURING.  
15 THEY'RE NOT GOING AWAY. THEY'RE GOING TO BE MANUFACTURING IN  
16 THE UNITED STATES AND IN THE FUTURE POSSIBLY IMPORTING AS WELL.  
17 SO NONE OF THAT IS GOING TO CHANGE.

18 HE HAS LEGAL POINTS ON HIS MOTION TO DISMISS. WE'LL  
19 DISPUTE THOSE.

20 **THE COURT:** SURE.

21 **MR. VAN NEST:** THAT'S FINE.

22 BUT AS YOUR HONOR OBSERVES, WE'VE BEEN ON FILE FOR  
23 MORE THAN A YEAR, STAYED FOR MORE THAN SIX MONTHS. WE MOVED  
24 HEAVEN AND EARTH TO GET THEM AN EARLY TRIAL, AND NOW ALL I'M  
25 ASKING IS THAT WE KEEP OUR DATE WHICH REQUIRES US TO GO

1 FORWARD.

2 WE ALL KNOW THAT THEY'LL BE OBJECTING TO THE  
3 DISCOVERY THAT'S OUT THERE, AND THERE WILL BE BACK AND FORTH,  
4 AND THERE WILL BE MEET AND CONFERS. SO THE IDEA THAT CISCO  
5 WILL BE DOING A LOT OF WORK ANY TIME VERY SOON IS WRONG, BUT  
6 SINCE WE BOTH RECOGNIZE THAT TO GET THIS TO TRIAL IN AUGUST, WE  
7 NEED A DISCOVERY CUTOFF IN THE FALL, WE'RE TALKING ABOUT A  
8 FIVE, SIX, SEVEN MONTHS OF DISCOVERY IF WE START RIGHT NOW.

9 SO THERE IS ABSOLUTELY NO BASIS -- I WAS UNHAPPY,  
10 DISTURBED, AND UPSET WHEN THEY ASKED FOR FURTHER STAY, GIVEN  
11 THAT WE'VE ALREADY GIVEN THEM WHAT THEY GOT FROM YOUR HONOR  
12 LAST FALL AND NOW ANOTHER TWO MONTHS FROM ME THROUGH GOODWILL,  
13 AND NOW THEY WANT TO DELAY IT FURTHER. IT'S JUST NOT RIGHT.  
14 AND WE OUGHT TO OPEN THIS UP AND GET IT GOING. AND THEN  
15 MR. DESMARAIS AND I CAN AGREE ON THE INTERIM DATES. YOUR HONOR  
16 HAS SCHEDULED THE TRIAL DATE, THE PRETRIAL, THE DAUBERTS, AND  
17 ALL THAT.

18 **THE COURT:** YEP.

19 **MR. VAN NEST:** ALL WE NEED TO DO IS FILL IN THE REST  
20 OF IT, WHICH WE CAN DO, BUT THERE'S NO WAY TO GET THIS THING TO  
21 TRIAL IN AUGUST UNLESS WE GET GOING NOW WITH OUR DISCOVERY.

22 **THE COURT:** YEAH, ALL RIGHT.

23 **MR. DESMARAIS:** ONE COMMENT --

24 **THE COURT:** YEP.

25 **MR. DESMARAIS:** -- ON THE LEGAL POINT THAT

1 MR. VAN NEST MADE?

2 IT IS TRUE THAT ARISTA IS STILL SELLING, BUT THAT  
3 MISSES THE POINT. SELLING ADJUDICATED INFRINGING PRODUCTS IN  
4 CONTRAVENTION OF AN ITC ORDER DOES NOT MAKE THE BASIS FOR AN  
5 ANTITRUST CLAIM.

6 **THE COURT:** WELL, I DON'T THINK HE JUST --

7 (SIMULTANEOUS COLLOQUY.)

8 **THE COURT:** HE DIDN'T SAY HE WAS SELLING UNLAWFUL  
9 PRODUCTS. HE SAID THIS IS A DESIGN AROUND THAT'S BEING SOLD.

10 (SIMULTANEOUS COLLOQUY.)

11 **MR. VAN NEST:** THAT WAS APPROVED BY CUSTOMS, APPROVED  
12 BY CUSTOMS.

13 **THE COURT:** ALL RIGHT.

14 **MR. DESMARAIS:** AND CUSTOMS HAS RECONSIDERED AND  
15 WITHDRAWN IT.

16 **THE COURT:** WELL, I'M NOT GOING TO DECIDE WHETHER THE  
17 REDESIGN IS INFRINGING OR NOT. I WANT TO HOLD THAT TRIAL DATE.  
18 I THINK IT WAS A REASONABLE TRIAL DATE. IT DIDN'T SEEM  
19 REASONABLE AT THE TIME. IT'S LOOKING LIKE IT'S COMING UP SOON  
20 AT THIS POINT.

21 I AM GOING TO LIFT THE STAY. I AM GOING TO ALLOW THE  
22 DISCOVERY TO GO FORWARD. I WELCOME THE MOTION TO DISMISS. IF  
23 THAT NARROWS ISSUES, THAT'S TO EVERYONE'S ADVANTAGE. AND I AM  
24 GOING TO REQUIRE THE PARTIES TO WORK OUT THE REST OF THE  
25 SCHEDULE -- I'M SURE YOU CAN DO THAT BY AGREEMENT -- AND SUBMIT

1 A STIPULATION TO ME WITHIN TWO WEEKS.

2 THERE WAS AN ADDED ISSUE OF THERE IS SOME PENDING  
3 DISCOVERY THAT WAS HALTED FOR THE STAY, AND THERE IS SOME  
4 DISPUTE AS TO WHETHER IT SHOULD BE -- THE PENDING DISCOVERY  
5 SHOULD BE DUE 30 DAYS FROM TODAY OR THE NUMBER OF DAYS THAT THE  
6 RULES WOULD ALLOW, AND I DON'T KNOW WHETHER YOU MEANT THE  
7 NUMBER OF DAYS REMAINING, THAT SOME HAD ELAPSED BEFORE THE  
8 STAY. I THINK WE OUGHT TO AGREE ON A DATE NOW AND NOT HAVE TO  
9 GO BACK AND DO CALCULATIONS. IS 30 DAYS UNREASONABLE?

10 **MR. DESMARAIS:** I THINK IT SHOULD BE (INDISCERNIBLE.)

11 **MR. VAN NEST:** I THINK THAT'S AT THE OUTSIDE.  
12 THEY'VE HAD THIS DISCOVERY FOR MONTHS, YOUR HONOR.

13 **THE COURT:** OKAY.

14 **MR. VAN NEST:** I WOULD ASK IT BE DONE IN TWO WEEKS  
15 WHEN WE GET STIP IN ON THE SCHEDULE.

16 **MR. DESMARAIS:** LIKE, YOUR HONOR, WE HAVEN'T BEEN  
17 WORKING ON THIS BECAUSE OF THE STAY.

18 **THE COURT:** RIGHT. I THINK 30 DAYS IS FINE, BUT NEW  
19 DISCOVERY CAN BE PROPOUNDED IMMEDIATELY, AND I EXPECT THAT IT  
20 WILL, AND THAT WILL HAVE THE NORMAL TIME. THAT'S 30 DAYS FROM  
21 TODAY.

22 I NOTICE THAT THERE IS A REQUEST FOR -- BY ARISTA FOR  
23 30 DEPOSITIONS, WHICH WOULD INCLUDE THE 30(B)(6). IT WASN'T  
24 CLEAR WHETHER YOU'VE -- IT LOOKS LIKE CISCO WANTS TO DO THE  
25 SAME PROCESS THAT WE DID BEFORE, AND THAT IS TAKE YOUR FIRST



1 TEN, MAKE THEM YOUR BEST, AND THEN JUSTIFY WITH A SPECIFIC  
2 DISCOVERY PLAN THE REMAINDER.

3 **MR. DESMARAIS:** EXACTLY. ESPECIALLY SINCE, AS WE'VE  
4 SAID, THESE PARTIES HAVE BEEN LITIGATING FOR YEARS. WE'VE  
5 DEPOSED ALMOST EVERYBODY.

6 (SIMULTANEOUS COLLOQUY.)

7 **THE COURT:** I DON'T KNOW IF THE ISSUES ARE THE SAME.

8 **MR. VAN NEST:** ACTUALLY, YOUR HONOR, WHAT WAS SAID BY  
9 COUNSEL AT THE LAST CMC WAS HE WAS WILLING TO MEET AND CONFER;  
10 HE WASN'T GOING TO HOLD US TO THE LIMIT.

11 **THE COURT:** GOOD. WELL, I WOULD HOPE YOU WOULD  
12 ADJUST THE LIMIT BY AGREEMENT AND ONLY BRING ME THE REMAINDER.

13 **MR. VAN NEST:** THAT'S WHAT WE'LL TRY TO DO.

14 **THE COURT:** I WOULD EXPECT THAT.

15 AND I THINK -- AND I'M -- I'M GLAD TO SET A FURTHER  
16 CASE MANAGEMENT ON IT, OR YOU CAN REQUEST IT WHEN YOU'RE READY.

17 **MR. VAN NEST:** I THINK IT'S WHATEVER YOUR HONOR  
18 PREFERS.

19 **THE COURT:** I DON'T --

20 **MR. VAN NEST:** WE CAN SIMPLY REQUEST IT. I LIKE THE  
21 IDEA OF A TELEPHONE CONFERENCE. MR. DESMARAIS IS IN NEW YORK.

22 **THE COURT:** YES.

23 **MR. VAN NEST:** WE'RE UP IN SAN FRANCISCO.

24 SO I THINK WE CAN DO THAT.

25 **THE COURT:** GOOD.

1           **MR. VAN NEST:** I THINK WE'LL BE ABLE TO AGREE TO AT  
2 LEAST AN INTERIM LIMIT THAT'S ABOVE THE TEN, GET STARTED, AND  
3 THEN BRING TO YOUR HONOR WHATEVER WE HAVE LEFT.

4           **THE COURT:** I THINK THAT MAKES SENSE. AND WE WENT  
5 THROUGH THIS PROCESS BEFORE. YOU KNOW WHAT KIND OF INFORMATION  
6 I'M LOOKING FOR --

7           **MR. VAN NEST:** WE SURE DO.

8           **THE COURT:** -- ON ADDITIONAL ONES.

9           **MR. VAN NEST:** WE SURE DO.

10          **THE COURT:** THAT MAKES SENSE.

11          AND, YES, MR. DESMARAIS, IT'S ALWAYS NICE TO SEE YOU.  
12 THANK YOU FOR TAKING THE TRIP THIS TIME.

13          **MR. DESMARAIS:** MY PLEASURE, YOUR HONOR.

14          **THE COURT:** BUT AS MANY TIMES -- GOOD.

15          AND AS MANY TIMES AS WE CAN DO THIS BY PHONE WHEN  
16 YOU'RE NOT OTHERWISE OTHER ON OTHER CASES, THAT WOULD BE GREAT.

17          **MR. DESMARAIS:** MAY I HAVE ONE --

18          (SIMULTANEOUS COLLOQUY.)

19          **THE COURT:** YES.

20          **MR. DESMARAIS:** IN LIGHT OF THE FACT THAT THE  
21 COMPLAINT IS -- HAS, IN OUR VIEW, SEVERAL SERIOUS, SERIOUS  
22 LEGAL CLAUSES THAT WE TALKED ABOUT.

23          **THE COURT:** YEAH.

24          **MR. DESMARAIS:** YOU KNOW, WHILE I UNDERSTAND YOUR  
25 HONOR NOT WANTING TO GRANT THE STAY -- AND I WON'T REARGUE

1 THAT -- BUT IT DOES MAKE LOGICAL SENSE AT LEAST TO BACK END THE  
2 DEPOSITIONS, RATHER THAN TO LET THE COURT DEAL WITH THE MOTION  
3 TO DISMISS.

4 COULD WE HAVE SOME SORT OF STAGGERED DISCOVERY WHERE  
5 WE GO (INDISCERNIBLE) TO THE DOCUMENTS TO -- YOU KNOW, IF WE'RE  
6 GOING TO RESOLVE THE MOTION TO DISMISS IN A FEW MONTHS, YOU  
7 KNOW, THERE'S STILL PLENTY OF TIME TO BACK END THE DEPOSITIONS.  
8 IT SEEMS LIKE SUCH A COLOSSAL WASTE --

9 **THE COURT:** WELL --

10 **MR. DESMARAIS:** -- TO JUST START ACTUAL  
11 DEPOSITIONS --

12 **THE COURT:** -- I'M GOING TO LEAVE THAT TO YOU AND  
13 MR. VAN NEST TO WORK OUT, AND, HOPEFULLY, BY AGREEMENT YOU CAN  
14 DO SOME OF THAT.

15 **MR. VAN NEST:** THANK YOU, YOUR HONOR.

16 **THE COURT:** I JUST THINK I NEED TO LET YOU TWO WORK  
17 THAT OUT FIRST. IT WOULD BE SOMEWHAT ARBITRARY IF I WERE TO  
18 DEAL WITH THAT NOW.

19 ALL RIGHT. WELL, LET'S SEE -- I DON'T KNOW THAT I'LL  
20 BE ABLE TO ADVANCE YOUR MOTION TO DISMISS. GO AHEAD AND GET  
21 THE DATE THAT WE CAN GIVE YOU, AND AS I -- AFTER THE BRIEFING'S  
22 DONE, IF I CAN FIND AN EARLIER DATE, WE WILL CERTAINLY ASK YOU  
23 IF YOU'RE AVAILABLE TO ADVANCE IT. I CAN'T PROMISE THAT,  
24 BUT --

25 **MR. DESMARAIS:** WE'LL MAKE OURSELVES AVAILABLE, YOUR

1 HONOR.

2 MR. VAN NEST: WE HAVE A BRIEFING SCHEDULE, YOUR  
3 HONOR, THAT GETS THE REPLIES IN BY MAY 11TH.

4 THE COURT: OKAY.

5 MR. VAN NEST: JUST FOR YOUR HONOR'S --

6 THE COURT: THAT'S HELPFUL.

7 MR. VAN NEST: WE NEGOTIATED THAT.

8 THE COURT: GREAT.

9 MR. VAN NEST: AND THE REPLY'S DUE MAY 11TH.

10 THE COURT: OKAY.

11 MR. DESMARAIS: SHOULD WE SET A DATE NOW WHAT  
12 WE'RE --

13 THE COURT: NO, NO. I'D LIKE YOU TO -- IT'S JUST  
14 EASIER THAT WE NOT -- BECAUSE A LOT OF FACTORS GO INTO PICKING  
15 THAT DATE. JUST HAVE YOUR OFFICE RESERVE A DATE, WHICH YOU CAN  
16 DO TWO WEEKS IN ADVANCE OF FILING, SO YOU'RE JUST ABOUT AT THAT  
17 POINT.

18 MR. DESMARAIS: YES, YOUR HONOR.

19 MR. VAN NEST: PERFECT.

20 THE COURT: ANYTHING ELSE TODAY?

21 MR. VAN NEST: I THINK WE'RE FINE, YOUR HONOR. THANK  
22 YOU.

23 THE COURT: OKAY. I'M NOT GOING TO SET A FURTHER  
24 CASE MANAGEMENT. I EXPECT WE'LL HAVE MANY, BUT I WILL REQUEST  
25 THAT YOU SIMPLY ASK FOR IT, AND THEN I'LL SET IT.

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**MR. VAN NEST:** WE'LL DO THAT IT WAY.

**THE COURT:** OKAY.

**MR. VAN NEST:** THANK YOU, YOUR HONOR.

**THE COURT:** OKAY. THANK YOU.

(PROCEEDINGS ADJOURNED AT 11:52 A.M.)

CERTIFICATE OF TRANSCRIBER

I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT  
TRANSCRIPT, TO THE BEST OF MY ABILITY, OF THE ABOVE PAGES OF  
THE OFFICIAL ELECTRONIC SOUND RECORDING PROVIDED TO ME BY THE  
U.S. DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, OF THE  
PROCEEDINGS TAKEN ON THE DATE AND TIME PREVIOUSLY STATED IN THE  
ABOVE MATTER.

I FURTHER CERTIFY THAT I AM NEITHER COUNSEL FOR,  
RELATED TO, NOR EMPLOYED BY ANY OF THE PARTIES TO THE ACTION IN  
WHICH THIS HEARING WAS TAKEN; AND, FURTHER, THAT I AM NOT  
FINANCIALLY NOR OTHERWISE INTERESTED IN THE OUTCOME OF THE  
ACTION.



JOAN MARIE COLUMBINI

MARCH 6, 2017